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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-649

JOSEPH BELLIZZI,

Petitioner,

v.

The Superior Court
of Stanislaus
County,

Respondent,

The People,

Real Party In
Interest.

Petition For A Writ of Certiorari To The Supreme Court Of The State Of California

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Petition For A Writ Of Certiorari
To The Supreme
Court Of The State Of California

The Petitioner, JOSEPH BELLIZZI, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of California rendered in these proceedings on July 11, 1974.

Opinions Below

The opinion of the Supreme Court reported in 12 Cal. 3d 33, appears at Appendix A, infra, pages 21 - . The opinion of the Court of Appeal, reported in 37 Cal. App. 3d 109 appears at Appendix B, infra, pages 49-66. There is no written opinion by the trial court, the Superior Court of Stanislaus County, but the substance of that court's ruling was to deny a formal motion for dismissal on due process grounds with an alternative that the case be continued upon condition that Petitoner waive

any claim of prejudice by reason of the denial of a speedy trial. (Response, p. 67).[1]

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on July 11, 1974. See Appendix A, page 21, infra. Thereafter a Petition for Rehearing was filed in said Court pursuant to which the Court, on August 2, 1974, made an order extending its time within which to grant or deny said petition to September 6, 1974. See Appendix C, page 67, infra. Ultimately, and on August 28, 1974, the Petition for Rehearing was denied. See Appendix D, infra, page 68. This Petition for

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[1] Reference is to Petitioner's Response to Return On Order to Show Cause, part of the record before the Supreme Court.

Certiorari is being filed within 90 days from the last date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, Subdivision (3).

Questions Presented

Pursuant to the provisions of Sections 1084, 1085, and 1102 of the Code of Civil Procedure of the State of California, Petitioner applied to the Court of Appeal, State of California, Fifth Appellate District, for a Writ of Prohibition/Mandate to compel dismissal of a criminal action against Petitioner upon grounds that to compel him to stand trial in the court below would be a denial of due process, and, in the alternative, to compel a continuance would deny him his right to a speedy trial. The questions thereby arising are:

1. Whether the action of the

California Supreme Court in affirming the trial court's judgment ordering Petitioner to proceed to trial without a material witness, or, in the alternative, to consent to a continuance, is a violation of the due Process Clause of the Fourteenth Amendment.

2. Whether the action of the California Supreme Court in affirming the trial court's judgment ordering Petitioner to proceed to trial without a material witness, or, in the alternative, to consent to a continuance, is a violation of Petitioner's right to a speedy trial as protected by the Sixth and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved

"...nor shall any State deprive any person of life, liberty, or property, without due process."

Constitution of the United States, Fourteenth Amendment, Section 1.

* * *

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

Constitution of the United States, Sixth Amendment

* * *

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial..."

Constitution of the State of California, Article I, Section 13.

* * *

"The welfare of the people of

the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, ..."

California Penal Code, Section 1050.

* * *

"In a criminal action the defendant is entitled:
1. To a speedy and public trial.
..."

California Penal Code, Section 686, Subdivision 1.

* * *

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
. . .
2. When a defendant is not brought to trial in a Superior

Court within 60 days after the finding of the indictment or filing of the information..."

California Penal Code, Section 1382, Subdivision 2.

* * *

Statement of Facts

On April 18, 1973, the Grand Jury of Stanislaus County indicted Petitioner under Section 11501 of the California Health and Safety Code for an alleged sale of heroin. Upon arraignment Petitioner entered a plea of not guilty and a trial by jury was set for June 4, 1973. Prior to trial, Petitioner obtained an order for pretrial discovery which provided, among other things, that the District Attorney of Stanislaus County furnish to Petitioner the current

address of one Wayne Morrow. The District Attorney refused to comply with the order. Accordingly, on the morning of trial and upon motion of the Petitioner, the trial court ordered the action dismissed. (Petition, pages 2-3).[2]

Thereafter, the District Attorney recharged the Petitioner with the same alleged offense, this time through the medium of a complaint in the Municipal Court of the Modesto Judicial District. Petitioner again entered a not guilty plea and the matter was set for a preliminary examination to be had on June 29, 1973. In conjunction with the preliminary examination, the Petitioner filed a written Notice of Motion to dismiss the action based upon the facts herein-

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[2] When "Petition" is used the reference is to the Petition for Writ of Prohibition/ Mandate, part of the record before the Superior Court.

after set forth. (Petition, pages 3-4).

One Evans was present in Petitioner's residence at the time of the alleged transaction with which Petitioner was charged. By prearrangement with the Petitioner, Evans was available during the week beginning June 4, 1973, to testify on Petitioner's behalf. At the time of preliminary examination he could not be located. (Petition, pages 3, and 4-5).

In substance, Petitioner asserted that the refusal of the District Attorney to comply with the discovery order in the earlier indictment proceeding had resulted in a delay in going to trial where there was clearly no legitimate reason for delay and had now served to deprive Petitioner of a fair hearing because of the unavailability of Evans, a material witness. The motion was argued at length and denied without prejudice to

renawal at trial time. (Preliminary, pages 61-80).[3]

Petitioner was held to answer on the charge and on July 20, 1973, an information was filed in the Superior Court of Stanislaus County charging the same alleged offense. Upon arraignment the case was set for trial on September 17, 1973. (Petition, page 5).

Thereafter, and on August 31, 1973, Petitioner again filed a Notice of Motion for Dismissal together with Points and Authorities, dealing with both the due process question and the denial of a Speedy trial. See Appendix E, pages 69-89 , infra. The motion was argued on September 7, 1973, September 18, 1973, and October 18, 1973.

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[3] This reference is to the Transcript of the Preliminary Examination in the Municipal Court, part of the record before the Superior Court.

In each instance it was denied although the trial court indicated its willingness to continue the trial of the matter if the Petitioner would so move. See Appendix F, pages 90-92, infra.

On October 24, 1973, Petitioner sought review of the trial court's order refusing to dismiss by means of a Petition for Writ of Prohibition and Mandate filed in the Court of Appeal. That court, on January 30, 1974, unanimously reversed the trial court and ordered a dismissal of the action. See Appendix B, infra, pages 49-66.

The Attorney General then petitioned for a hearing in the California Supreme Court and on July 11, 1974, that Court, by a 4-3 opinion, denied the Writ of Prohibition/Mandate thus upholding the order of the trial court. In substance, the majority held that there was no denial of due process because Petitioner

was negligent in not making certain that the witness, Evans, would be available for trial, he being a "defense" witness. It further held, contrary to the record, that Petitioner had consented to continuances and, therefor, had not been denied a speedy trial. Petitioner had repeatedly objected to continuances (Response, pages 30, 37, 44, 47, 48, 40, 52, 61, 62, 64, 66 and 67).

He now petitions for certiorari.

Reasons for Granting the Writ

1. The Decision Of The California Supreme Court Is In Direct Conflict With The Due Process Principles Enunciated In This Court's Dickey V. Florida Ruling As Concerns A Fair Trial.

It seems clear to us that Petitioner was entitled to the disclosure of the witness', Morrow's, address pursuant to the discovery order made in the indictment proceeding in the trial court. This proposition is supported by Alford v. United States, 282 U.S. 687, at page 693. cited in our letter of May 12, 1974, to the California Supreme Court. Accordingly, there was no legitimate reason for the District Attorney to refuse disclosure, which, if made, would have allowed Petitioner to proceed to trial on June 4, 1973, with witness, Evans, available. The Opinion[4] cannot be reconciled with Alford nor with the California Court's own Opinion in Eleazer v. Superior Court, 1 Cal 3d 847. In that case the California Court held that there can

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[4] References to the Opinion are to the California Supreme Court Opinion, Appendix A.

be no justification for refusal to disclose an informer's address, even if the motive is to "fasten the security of the informer." Eleazer v. Superior Court, supra, page 852.

It seems equally clear that the absence of the material witness, Evans, is a prejudice which serves to deny Petitioner a fair trial. To put the matter otherwise, where there has been delay without legitimate reason and prejudice results there is a denial of due process. Powell v. United States, 352 F. 2d 705, at page 708; Ross v. United States, 349 F. 2d 210, at page 215; Jackson v. United States, 351 F. 2d 821, at pages 822-823; United States v. Curry, 284 F. Supp. 458, at page 467. See Appendix E, pages 69-89, infra.

Finally, it seems to us that the Opinion simply cannot be reconciled with Dickey v. Florida, 398 U.S. 30. This

Court found in that case that a defendant who was ready to proceed with trial, but failed to do so because of prosecutorial delay, suffered prejudice warranting a summary dismissal by reason of the subsequent death and absence of defense witnesses.

Although Petitioner relied upon Dickey v. Florida in the trial court and at the Supreme Court level, the Opinion fails to mention it.

2. The Decision Of The California Supreme Court Is In Direct Conflict With The Due Process Principles Enunciated In This Court's Dickey v. Florida Ruling As Concerns A Speedy Trial.

In Klopfer v. North Carolina, 386 U.S. 213, this court held that the Sixth Amendment right to a speedy trial is so

basic and fundamental that it applies to the States through the Fourteenth Amendment.

Subsequent holdings of this court have confirmed that a denial of the right of a speedy trial is a denial of Fourteenth Amendment due process. Smith v. Hooey, 393 U.S. 374; United States v. Marion 404 U.S. 307; and Barker v. Wingo, 407 U.S. 514.

Under California law the Petitioner was entitled to be tried within 60 days next following the return of the indictment or the filing of an information in the Superior Court. California Penal Code, Section 1392. Petitioner repeatedly asserted that right. His only waiver was for the purpose of petitioning the Court of Appeal for a Writ of Prohibition/Mandate after the trial court had denied his application for dismissal.

In any event, whether we relate to the Sixth Amendment, the Fourteenth Amendment, Article I, Section 13, of the California Constitution, or Section 1392, we believe the factual situation herewith presented is literally encompassed by the language of Chief Justice Burger in Dickey v. Florida, supra, page 38:

> "...no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissable as a matter of law."

Finally, although the length of the delay here (6 months from indictment to denial of motion to dismiss) may be relatively short as compared with Klopfer (indefinite), Hooey (7 years), Dickey

(8 years), Marion (3 years), and Wingo (5 years), the other 3 tests established by Barker v. Wingo, namely, reason for delay, Petitioner's assertion of his right, and prejudice, must be resolved in Petitioner's favor. The delay resulted from the conduct of the prosecution, Petitioner has repeatedly asserted his right to a speedy trial, and the end result has been to deprive Petitioner of a material witness and, thus, a fair trial.

Conclusions

Petitioner is entitled to a fair, impartial, and speedy trial. This means a trial in which all material facts are presented fairly and one in which defendant's constitutional guarantees are neither qualified nor infringed. It means a trial in which Petitioner shall

have the right to prepare, and to present, his defense. This also means that such rights are to be accorded at the time the case is scheduled to go to trial, not at some later date, convenient only to the prosecution.

For the foregoing reasons, we believe that a Writ of Certiorari should issue to review the Judgment and Opinion of the California Supreme Court.

Respectfully submitted,

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APPENDIX A

SUPREME COURT
FILED
G. E. BISHEL, Clerk
JUL 11 1974

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

JOSEPH BELLIZZI,

Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF STANISLAUS,

Respondent;

THE PEOPLE,

Real Party in Interest.

S.F. 23107

Sup. Ct. No. 122338

The People's failure to comply with a pretrial discovery order led to the dismissal of drug charges against petitioner. Two days later, a new complaint was lodged against petitioner containing the same charges. In the interim, however, a witness assertedly favorable to petitioner evidently left the state upon learning of the dismissal

SEE DISSENTING OPINION

and has not been located since. The question arises whether, under these circumstances, petitioner's inability to call this witness in his defense / at his 1/ forthcoming trial constitutes a denial of his right to due process of law. A subsidiary question is whether the People's decision to refile the charges rather than appeal the dismissal order has deprived petitioner of his right to a speedy trial.

We have concluded that the unavailability of petitioner's witness was not attributable to any impropriety on the People's part and that the prosecution acted with reasonable dispatch in attempting to bring petitioner to trial. Accordingly, the instant petition to restrain further proceedings in this case should be denied.

The charge brought against petitioner (Health & Saf. Code, § 11501)

is based upon an alleged sale of heroin to David Morrow, a paid police informant. Petitioner was indicted for the offense and a jury trial scheduled for June 4, 1973. Petitioner moved for discovery of the names and addresses of all prospective prosecution witnesses and the court so ordered. Although the People disclosed informant Morrow's name and made him available to petitioner's counsel for pretrial examination, Morrow's address was not revealed (evidently because the People feared for his safety). Accordingly, [1] the trial court granted petitioner's motion to dismiss the action in the interest of justice (Pen. Code, § 1385). Instead of taking an appeal from the dismissal (Pen. Code, § 1238, subd. (a), subsec. (8)), the prosecution exercised its statutory right (see Pen. Code, § § 1387, 1382, subd. (2)), and filed a new complaint containing the same

[1] 2/

charge set forth in the indictment. The new complaint was filed on June 6, two days following the entry of the trial court's dismissal order.

At the preliminary hearing which followed, informant Morrow testified that he had purchased heroin from petitioner at petitioner's home on the evening of January 31, 1973. Morrow further testified that a third person, Hal Evans, had been present at petitioner's home that evening but had temporarily left the house during the actual purchase of heroin from petitioner. It now appears that Evans, having learned of the June 4 dismissal of charges against petitioner, left town and can not be located. It is the alleged present unavailability of Evans as a defense witness which gives rise to petitioner's contention that he cannot obtain due process in the forthcoming trial. [3]

1. Due Process of Law.

Generally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses assertedly necessary to his defense. (People v. Kirkpatrick, 7 Cal.3d 480, 486.) The rule is otherwise, however, where it is shown that the prosecution has wrongfully deprived an accused of the opportunity to secure the presence of a material witness. This was made clear in People v. Kiihoa, 53 Cal.2d 748, in which we held that it was a denial of due process for the People to defer prosecution of the defendant until a police informant who was a material witness had left the jurisdiction.

Petitioner contends that under the rationale of People v. Kiihoa, supra, 53 Cal.2d 748, the filing of a new complaint in the instant case constituted a similar denial of due process. We disagree. The fundamental due process principle

underlying Kiihoa is that the prosecution may not deprive an accused of the opportunity to present material evidence which might prove his innocence. Even if the prosecution's motives are "praiseworthy," they can not prevail when they "inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (Italics added; id. at p. 754.) Significantly Kiihoa involved the unavailability of a police informant.[1] As / 4/ such, the witness was in contact with, and under the control of, the prosecution. Realistically only the prosecution could have assured the witness' presence at trial and thus fairness required that the

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1/ The instant case also involves a police informant, Morrow, and, as stated above, the nondisclosure of the latter's address led to dismissal of the original indictment. Petitioner does not here contend, however, that Morrow will be unavailable as a witness in the forthcoming

(Fn. 1 continued)

People, rather than the defendant, bear the responsibility for maintaining that witness' availability.[2/] (See Eleazer v. Superior Court, 1 Cal.3d 847.)

In contrast, in the instant case, witness Evans was a friend of petitioner and had agreed to / testify 5/ in his defense. When the charges against

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(Fn. 1 continued)

trial or that the People's refusal to furnish Morrow's address itself violated due process.

2/ Similarly, Harris v. Superior Court, 35 Cal.App.3d 24, also relied upon by petitioner, is not controlling. In that case defendant's conviction was reversed on the ground that the trial court had erred in refusing to compel disclosure of the identity of a police informant who was a material witness. By the time the proceedings were reinitiated the informant had disappeared. The court held that further prosection would constitute a denial of due process, reasoning that "the original refusal of the People to disclose the name of the informant coupled with circumstances beyond control of petitioner has deprived petitioner of information already determined essential to her having a fair trial."

(Fn 2 continued)

petitioner were ordered dismissed, petitioner or his counsel should have realized that the prosecution could either appeal that order[3/] or refile the charge in a new action.[4/] Inasmuch as it was

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(Fn. 2. continued)

(Italics added; id., at p. 27.) Harris, like People v. Kiihoa, supra, 53 Cal.2d 748, deals only with the situation in which a police informant who is a material witness becomes unavailable. The common sense rationale of Kiihoa and Harris, that the People must bear the responsibility of producing their own agents and informants, is inapplicable where, as in the instant case, the defendant has ample opportunity to assure his witness' presence at trial.

3/ The order of dismissal was an appealable order (Pen. Code, § 1238, subd. (8)), and the People would have had 60 days within which to file the notice of appeal (rule 2, subd. (a), and rule 31, subd. (a), Cal. Rules of Court).

4/ An order for the dismissal of a felony action made before jeopardy has attached is not a bar to further prosecution (Pen. Code, § 1387), and upon refiling the 60-day time period within which to bring defendant to trial (Pen. Code, § 1382, subd. (2)), starts anew (People v. Faulkner, 28 Cal.App.3d 384, 395).

petitioner who informed witness Evans of the dismissal, he had ample opportunity to ascertain Evans' future plans so that he could reach him in the event a trial ultimately were held. Since Evans' unavailability as a defense witness cannot be said to be the "inevitable" result of the People's action or omission, it would be unreasonable to hold the People accountable therefor.

2. Right to Speedy Trial

Petitioner also contends that the People's decision to refile the charge rather than appeal the dismissal order has deprived him of his right to a speedy trial. His contention, however, is without merit. /6/

It is well established that the 60-day statutory period within which defendant must be brought to trial (Pen. Code, § 1382, subd. (2)), begins anew with the filing of the new indictment.

(People v. Godlewski, 22 Cal.2d 677, 683; People v. Faulkner, supra, 28 Cal. App.3d 384, 395.) In the instant case the People refiled charges against petitioner two days after dismissal of the original proceedings and rearrested him six days later. All delays beyond the applicable 60-day period have been requested by or granted with the consent of petitioner. The People have thus clearly complied with the statutory requirements.

Nevertheless, the prosecution's statutory right to refile cannot infringe upon petitioner's constitutional right to a speedy trial. To hold, however, that petitioner had been denied a speedy trial as a result of prosecutorial delay in this case would require us to find that the prejudicial effect of the delay outweighed any justification for it. (Jones v. Superior Court, 3 Cal.3d 734,

740; see Sykes v. Superior Court, 9 Cal. 3d 83.)[5/] Of / course, in performing 7/ this balancing test, we consider and weigh only that "prejudice" for which petitioner was not responsible. As noted above, petitioner in the instant case was in contact with his friend, witness Evans, and yet failed to take steps to assure that Evans would remain available to testify. If petitioner's negligence is a significant factor in causing the alleged prejudice, he should not be

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5/ Our conclusion remains the same if we employ the "ad hoc balancing test" of Barker v. Wingo, 407 U.S. 514, 530, which requires consideration of such factors as the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant in appraising a claimed denial of his right to a speedy trial under the Sixth Amendment to the United States Constitution. Here, as noted above, the delay was minimal and, in any event, whatever prejudice defendant may have suffered was primarily attributable to his own neglect.

entitled to assert such prejudice as a ground for speedy trial relief.

The petition for a writ of prohibition is denied.

BURKE, J.

WE CONCUR:

WRIGHT, C. J.

McCOMB, J.

CLARK, J. 8/

BELLIZZI v. SUPERIOR COURT

S.F. 23107

DISSENTING OPINION BY MOSK, J.

I dissent.

Whether deliberately or inadvertently, the obdurate refusal of the prosecutor to comply with a valid court order was directly responsible for the denial of a speedy trial to this defendant. The seven-month delay has been demonstrably prejudicial and will likely prevent a fair trial. It follows that defendant is entitled to the relief he seeks.

The issue was properly analyzed in the Court of Appeal opinion written by Justice Franson and concurred in by Presiding Justice G. A. Brown and Assigned Justice Thompson. I adopt their

opinion as my dissent:* 1/

On April 18, 1973, the Grand Jury of Stanislaus County indicted petitioner, charging him with a sale of heroin on January 31, 1973, in violation of Health and Safety Code section 11501 (now § 11352). Petitioner entered a plea of not guilty and a jury trial was scheduled for June 4, 1973.

On May 31, 1973, petitioner moved for discovery of the names and current addresses of all prospective witnesses who would be called to testify

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*Brackets together, in this manner [ ] without enclosing material, are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2, and cases cited.)

by the prosecution at the trial. On June 1, the court ordered the prosecution to furnish the petitioner with "the names and current addresses of all persons who will be called to testify at the trial of the within action, particularly including the current address of [David] Morrow." The prosecution refused to comply with the order, and on June 4, 1973, prior to the commencement of trial, the action was dismissed.

Thereafter, on June 6, 1973, the People filed a complaint against petitioner containing the same charges as in the indictment.[1/] On June 29, and July 16, a preliminary [2/] hearing was

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1/ Inasmuch as the order of dismissal was an appealable order (Pen. Code, § 1238, subd. (8)) we presume that when the People elected to refile the charges against petitioner rather than seek appellate review of the order of dismissal they recognized the propriety of the order requiring the production of the address of Morrow and intended to

(Fn. 1 continued)

held and at the conclusion thereof, petitioner moved to dismiss the action because he was unable to produce Hal Evans who he contended was a material witness to the charge pending against him. Petitioner asserted that his inability to produce this witness was caused by the delay in prosecution which had resulted from the district attorney's refusal to furnish Morrow's address when petitioner was first charged with the offense. The motion was denied and petitioner was held to answer to the superior court.

On July 20, 1973, an information was filed against petitioner; he again was arraigned, entered a plea of not

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(Fn. 1 continued)

furnish the address to avoid another dismissal. The duty to disclose information as to the whereabouts of a material witness is clear. (Smith v. Illinois, 390 U.S. 129, 131-133 [19 L.Ed.2d 956, 958-960, 88 S.Ct. 748, 750]; Eleazer v. Superior Court, 1 Cal.3d 847, 853 [83 Cal.

(Fn. 1 continued)

guilty and the case was set for trial on September 17, 1973.

On August 31, 1973, petitioner moved to dismiss the action upon the grounds that he had been denied due process of law and the right to a speedy trial as a result of the unjustified delay in prosecution which resulted in his being deprived of a material witness.

On September 7, petitioner's motion to dismiss came on for hearing. The district attorney produced Marian Evans, mother of Hal Evans, who testified that her son's current address was 355 Columbia Street, Bend, Oregon. The respondent court issued a certificate to the

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(Fn. 1 continued)

Rptr. 586, 464 P.2d 42]; People v. Mascarenas, 21 Cal. App.3d 660, 666-668 [98 Cal.Rptr. 728]; People v. Helmholtz, 10 Cal.App.3d 441, 446 [88 Cal.Rptr. 743]; see also Evid. Code, § 1041, 1042.)

Circuit Court of the State of Oregon for Deschutes County specifying that Evans was a / material witness and asking that 3/ he be required to attend the proceedings in the instant action.

On September 18, 1973, defense counsel and the district attorney indicated that witness Evans could not be found at the Oregon address and that his whereabouts was unknown. Petitioner's motion to dismiss was denied and the case was continued for trial to October 23, 1973, and thereafter continued again to November 7. On October 24, the instant petition for extraordinary relief was filed with this court, and on November 16 we issued an order to show cause as to why the action should not be dismissed. [ ]

Petitioner's declaration in support of his motion to dismiss states that he had known Hal Evans personally for approximately 11 years and saw him

frequently between December 1, 1972, and June 4, 1973. The last time he saw Evans was on the morning of June 4 at about 11 a.m. at the residence of Joel Zamora, which is one of the places Evans told him that he could be reached whenever petitioner wanted him for the purpose of testifying at his trial. Evans had promised him that he would be available to testify at the / trial scheduled for 4/ June 4. When petitioner saw Evans on the morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was

there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973, because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail. [ ]

Petitioner contends that to force him to trial without the benefit of Evans' testimony would be a denial of his right to a fair trial. We conclude that petitioner's contention has merit.

Normally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses necessary to his defense. He, of course, is entitled to a / reasonable continuance 5/

to locate the witness but if he is not successful he nevertheless must stand trial. (People v. Kirkpatrick, 7 Cal.3d 480, 486 [102 Cal.Rptr. 744, 498 P.2d 992].)

However, the rule is otherwise where it is shown that the defendant has been deprived of the testimony of a material witness because of improper conduct on the part of the prosecution. In Harris v. Superior Court, 35 Cal.App. 3d 24 [110 Cal.Rptr. 400], the defendant was convicted of possession of heroin. On appeal the judgment was reversed on the ground that the trial court erred in refusing to compel disclosure of the name of an informer who was determined to be a material witness. Thereafter, criminal proceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and

he could not be located. In ordering the action dismissed, the reviewing court held that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, on retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer it must be the People and not the accused. / 6/

In People v. Kithoa, 53 Cal. 2d 743 [3 Cal.Rptr. 1, 349 P.2d 673], the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who was a material witness and deferred prosecuting the defendant for some five months until the informant had left the state, thereby rendering himself immune from process. In reversing the

conviction, the Supreme Court held that a denial of a fair trial and due process would exist "where the prosecution is allowed to control the course of the proceedings in a manner which would prevent the accused from presenting material evidence." It was noted that it is the duty of the district attorney not to obtain convictions but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the duty of the trial judge to see that facts material to the charge are fairly presented so that the constitutional guaranties of the defendant are not violated.

By clear analogy the due process standard enunciated in Harris and Kiihoa is applicable to the case at bench. To force petitioner to trial without the testimony of Evans in the face of the prosecution's improper refusal to comply

with the discovery order which resulted in a dismissal of the action on June 4 would be to deny petitioner his right to a fair trial. 7/

Viewing the problem from the perspective of petitioner's right to a speedy trial, as guaranteed by the Sixth Amendment and article I, section 13, of the California Constitution, we observe that petitioner originally was scheduled for trial on June 4 when Evans was available as a witness. However, because the prosecution refused to comply with the discovery order, the trial was delayed until November, almost seven months after the original indictment. 2/

2/ Generally, an order for the dismissal of a felony action made before jeopardy has attached is not a bar to further prosecution (Pen. Code, § 1387). Upon refiling, the 60-day time period within which to bring a defendant to trial (Pen. Code, § 1382) starts anew (People

(Fn. 2 continued)

The test for determining whether a defendant has been denied the right to a speedy trial by reason of prosecutorial delay is to weigh the prejudice to the defendant against the justification shown for the delay. (Jones v. Superior Court, 3 Cal.3d 734, 741, fn. 1 [91 Cal.Rptr. 578, 478 P.2d 10]; People v. Archerd, 3 Cal.3d 615, at pp. 639-640 [91 Cal.Rptr. 397, 477 P.2d 421]; Penney v. Superior Court, 28 Cal.App.3d 941, 951-952 [105

(Fn. 2 continued)

Faulkner, 28 Cal.App.3d 384, 395 [104 Cal.Rptr. 625]). However, the prosecution's statutory right to refile cannot overcome the state and federal constitutional guaranties of a speedy trial, and where an accused has shown actual prejudice from the delay, he is entitled to a dismissal. (See People v. Williams, 71 Cal.2d 614, 623 [79 Cal.Rptr. 65, 456 P.2d 633]; People v. Wilson, 60 Cal.2d 139, 150-151 [32 Cal.Rptr. 44, 383 P.2d 452]; cf. Harris v. Superior Court, supra, 35 Cal.App.3d 24, 27.)

Cal.Rptr. 162]; People v. Vanderburg, 32 Cal.App.3d 526, 531 [108 Cal.Rptr. 104].)/ 8/

Petitioner has clearly shown prejudice. It is undisputed that Evans is a material witness. He was present in petitioner's house at or about the time the alleged sale took place and according to the allegations of petitioner's affidavit his testimony would have substantial probative value on the question of petitioner's guilt or innocence. Petitioner's showing that Evans was available to testify at the original trial date but, thereafter, became unavailable, also is unchallenged.

Real party in interest is unable to justify the delay other than by arguing that there has been no deliberate suppression of evidence on their part nor has there been any showing that they knew or suspected that Evans would become unavailable as a witness. However, intentional suppression

of evidence of bad faith on the part of the prosecution is not an essential element of a defendant's right to a fair or speedy trial. (People v. Kiihoa, supra, 53 Cal.2d at p. 753; Penney v. Superior Court, supra, 28 Cal.App.3d at p. 953.) As stated in Kiihoa: "It is next contended that because there was no procurement of or active participation by the law enforcement agency in [the informant's] removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that the police did not arrange for [the informant's] absence. / The 9/ critical question, however, is not necessarily one of improper conduct in bringing about [the informant's] absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded

that the circumstances surrounding this prosecution affected and mitigated against the defendant's right to a fair and impartial trial." (53 Cal.2d at p. 753.)

Similarly, in Penney v. Superior Court, supra, 28 Cal.App.3d 941, at p. 953, we said: "The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A 'legitimate reason' logically requires something more than the absence of governmental bad faith."

Under the circumstances we see no alternative but to grant petitioner the relief prayed for. [ ]

MOSK, J.

WE CONCUR:

TOBRINER, J.
SULLIVAN, J.

10/

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSEPH BELLIZZI, Petitioner, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	5 Civ. No. 2141 (Sup. Ct. No. 122338 O P I N I O N FILED JAN 30 1974 DAVID BLOMGREN, Clerk

Petition for a writ of prohibition and/or mandate to restrain respondent court from further proceeding in the criminal action now pending against petitioner. Writ of prohibition granted.

ROBERT R. ELLEDGE for Petitioner.

EVELLE J. YOUNGER, Attorney General, EDWARD A. HINZ, JR., Chief

Assistant Attorney General, DORIS H. MAIER, Assistant Attorney General, and ROGER E. VENTURI, Deputy Attorney General, for Real Party in Interest.

No appearance for Respondent.

CHRONOLOGY

On April 18, 1973, the grand jury of Stanislaus County indicted petitioner, charging him with a sale of heroin on January 31, 1973, 1/ in violation of Health and Safety Code section 11501. Petitioner entered a plea of not guilty and a jury trial was scheduled for June 4, 1973.

On May 31, 1973, petitioner moved for discovery of the names and current addresses of all prospective witnesses who would be called to testify by the prosecution to furnish the petitioner with "the names and current addresses of all persons who will be called to testify at the trial of the within action, particularly including the current address of

unable to produce Hal Evans who he contended was a material witness to the charge pending against him. Petitioner asserted that his inability to produce this witness was caused by the delay in prosecution which had resulted from the district attorney's refusal to furnish Morrow's address when petitioner was first charged with the offense. The motion was denied and petitioner was held to answer to the superior court. 2/

On July 20, 1973 an information was filed against petitioner; he again was arraigned, entered a plea of not guilty and the case was set for trial on September 17, 1973.

On August 31, 1973, petitioner moved to dismiss the action upon the grounds that he had been denied due process of law and the right to a speedy trial as a result of the unjustified delay in prosecution which resulted in

his being deprived of a material witness.

On September 7, petitioner's motion to dismiss came on for hearing. The district attorney produced Marian Evans, mother of Hal Evans, who testified that her son's current address was 355 Columbia Street, Bend, Oregon. The respondent court issued a certificate to the Circuit Court of the State of Oregon for Deschutes County specifying that Evans was a material witness and asking that he be required to attend the proceedings in the instant action.

On September 18, 1973, defense counsel and the district attorney indicated that witness Evans could not be found at the Oregon address and that his whereabouts was unknown. Petitioner's motion to dismiss was denied and the case was continued for trial to October 23, 1973, and thereafter continued again to November 7. On October 24, the instant petition

for extraordinary relief was filed with this court, and on November 16 we issued an order to show cause as to why the action should not be dismissed. / 3/

FACTS

At the preliminary hearing, David Morrow testified as follows: On January 31, 1973, about 7 p.m. he made arrangements with officers of the Modesto Police Department to attempt a "buy" from petitioner. Morrow and his car were searched by the police and he was given $50 with which to purchase heroin. Thereafter, he drove to petitioner's residence at 136 James Street in Modesto. The officers followed him in a separate car and waited outside.

Morrow knocked on petitioner's door; petitioner answered the door and invited him in. Morrow stated that petitioner and Hal Evans were having a conversation and "after their conversation

I asked [petitioner] if he had any spoons for sale and he said that he had." Morrow testified that Evans was at the residence for only a short period of time and that after Evans' conversation with the petitioner Evans left. Morrow stated that after Evans left he followed petitioner into the bedroom where he observed an amount of heroin on a nightstand. He stated that petitioner cut a portion of the heroin into a balloon and sold it to him for $40. Just before leaving the residence, Evans came back into the front room and made a few remarks about a car that was outside.

After leaving the residence Morrow turned over the heroin and $10 in change to the officers. He also advised the officers that Evans had been at petitioner's residence.

On cross-examination, Morrow acknowledged that Evans had been present

at other times when he made buys for the police department and that he had seen Evans make sales to other persons. He also stated, "when I was in the Bellizzi residence, that Mr. Bellizzi and / 4/ Mr. Evans were discussing a sale, but I did not actually see them transact money."

Petitioner's declaration in support of his motion to dismiss states that he had known Hal Evans personally for approximately 11 years and saw him frequently between December 1, 1972 and June 4, 1973. The last time he saw Evans was on the morning of June 4 at about 11 a.m. at the residence of Joel Zamora, which is one of the places Evans told him that he could be reached whenever petitioner wanted him for the purpose of testifying at his trial. Evans had promised him that he would be available to testify at the trial scheduled for June 4. When petitioner saw Evans on the

morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973 because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail.

morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973 because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail.

The declaration of Joel Zamora states that he has known Evans for approximately 10 years and would usually see him on an average of once a week up until June 4, 1973. He states that he saw Evans / around 11 a.m. on the morning 5/ of June 4, at his residence, when petitioner came to the house to tell him that the charges against petitioner had just been dismissed. Zamora's declaration states that he last saw Hal Evans on either Wednesday or Thursday of that week, June 6 or June 7, when Evans came to his house but that he has not seen him since that time and has been unable to find out where he is although he has made inquiries to other people as to his whereabouts.

DISCUSSION

Petitioner contends that to force him to trial without the benefit of Evans' testimony would be a denial of his

right to a fair trial. We conclude that petitioner's contention has merit.

Normally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses necessary to his defense. He, of course, is entitled to a reasonable continuance to locate the witness but if he is not successful he nevertheless must stand trial. (People v. Kirkpatrick, 7 Cal.3d 480, 486.)

However, the rule is otherwise where it is shown that the defendant has been deprived of the testimony of a material witness because of improper conduct on the part of the prosecution. In Harris v. Superior Court, 35 Cal.App. 3d 24, the defendant was convicted of possession of heroin. On appeal the judgment was reversed on the ground that the trial court erred in refusing to compel disclosure of the name of an informer who was determined to be a material

witness. Thereafter, criminal proceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and he could not be located. In ordering the action dismissed, the reviewing court held / 6/ that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, in retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer, it must be the People and not the accused.

In Kiihoa v. Superior Court, 53 Cal.2d 748, the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who

witness. Thereafter, criminal prceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and he could not be located. In ordering the action dismissed, the reviewing court held / 6/ that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, in retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer, it must be the People and not the accused.

In Kiihoa v. Superior Court, 53 Cal.2d 748, the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who

was a material witness and deferred prosecuting the defendant for some five months until the informant had left the state, thereby rendering himself immune from process. In reversing the conviction, the Supreme Court held that a denial of a fair trial and due process would exist "where the prosecution is allowed to control the course of the proceedings in a manner which would prevent the accused from presenting material evidence." It was noted that it is the duty of the district attorney not to obtain convictions but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the duty of the trial judge to see that facts material to the charge are fairly presented so that the constitutional guaranties of the defendant are not violated.

By clear analogy the due process

standard enunciated in Harris and Kiihoa is applicable to the case at bench. To force petitioner to trial without the testimony of Evans in the face of the prosecution's improper refusal to comply with the discovery order which resulted in a dismissal of the action on June 4 would be to deny petitioner his right to a fair trial. /7/

Viewing the problem from the perspective of petitioner's right to a speedy trial, as guaranteed by the Sixth Amendment and article I, section 13 of the California Constitution, we observe that petitioner originally was scheduled for trial on June 4 when Evans was available as a witness. However, because the prosecution refused to comply with the discovery order, the trial was delayed until November, almost seven months after

Superior Court, 28 Cal.App.3d 941, 951-952; People v. Vanderburg, 32 Cal.App.3d 526, 531.)

Petitioner has clearly shown prejudice. It is undisputed that Evans is a material witness. He was present in petitioner's house at or about the time the alleged sale took place and according to the allegations of petitioner's affidavit his testimony would have substantial probative value on the question of petitioner's guilt or innocence. Petitioner's showing that Evans was available to testify at the original trial date but, thereafter, became unavailable, also is unchallenged. /8/

Real party in interest is unable to justify the delay other than by arguing that there has been no deliberate suppression of evidence on their part nor has there been any showing that they knew or suspected that Evans would become

unavailable as a witness. However, intentional suppression of evidence or bad faith on the part of the prosecution is not an essential element of a defendant's right to a fair or speedy trial. (People v. Kiihoa, supra, 53 Cal.2d at 753; Penney v. Superior Court, supra, 28 Cal. App.3d at 953.) As stated in Kiihoa:

> "It is next contended that because there was no procurement of or active participation by the law enforcement agency in [the informant's] removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that the police did not arrange for [the informant's] absence. The critical question, however, is not necessarily one of improper conduct in bringing about [the informant's] absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded that the circumstances surrounding this prosecution affected and mitigated against the defendant's right to a fair and impartial trial." (53 Cal.2d at 753.)

Similarly, in Penney v. Superior

Court, supra, 25 Cal.App.3d 941 at 953, we said:

> "The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A 'legitimate reason' logically requires something more than the absence of governmental bad faith."

Under the circumstances we see no alternative but to grant petitioner the relief prayed for. / 9/

Let a peremptory writ of prohibition issue restraining respondent court from further proceeding with this action other than to order a dismissal of the action.

Franson
J..

WE CONCUR:

Brown (Geo A)
P.J.

Thompson
J. 10/

APPENDIX C

S.F. No. 23107

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
AUG 2 1974
G. E. BISHEL, Clerk

BELLIZZI

v.

THE SUPERIOR COURT - COUNTY OF STANISLAUS

The time for granting or denying a rehearing in the above cause is hereby extended to and including September 6, 1974.

Wright
Chief Justice

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 28 1974

I have this day filed Order _____

REHEARING DENIED

In re: S.F. No. 23107

Bellizzi

vs.

Superior Court, Stanislaus

Respectfully,

G. E. BISHEL
Clerk

APPENDIX E

Law Offices of
ROBERT R. ELLEDGE
1301 K Street, Suite E
Post Office Box 852
Modesto, California 95353
Telephone (209) 522-1007

FILED
1973 AUG 31 PM 3 03
STEVE R. NELSON,
CLERK

Attorneys for Defendant

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOSEPH BELLIZZI, Defendant.	NO. 122338 NOTICE OF MOTION FOR DISMISSAL

TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO DONALD N. STAHL, DISTRICT ATTORNEY OF THE COUNTY OF STANISLAUS, STATE OF CALIFORNIA:

NOTICE IS HEREBY GIVEN that on the 7th day of September, 1973, at the hour of 9:00 o'clock a.m. of said day, or as soon thereafter as the matter can be

heard, at the Courtroom of Department No. 2 of the above-entitled Court, at the Courthouse, in the City of Modesto, County of Stanislaus, State of California, the defendant will move the above-entitled Court for an order dismissing the within action upon grounds that the defendant has / been denied due process of law by 1/ reason of unnecessary delay resulting in prejudice to him and upon grounds that he has been denied the right to a speedy trial resulting in prejudice to him.

THIS MOTION is based upon this notice and the points and authorities in support of motion to dismiss on file herein, the supporting declarations of ROBERT R. ELLEDGE, JOSEPH BELLIZZI, and JOEL ZAMORA, together with such oral and documentary evidence as may be presented at the time of hearing this motion, upon all the pleadings, papers and records,

including the testimony taken at the preliminary examination herein, and upon the content of that certain file entitled The People of the State of California vs. Joseph Bellizzi, Stanislaus County Superior Court action No. 21113 of which the Court is requested to take judicial notice pursuant to the provisions of Section 452, Subdivision (d), of the Evidence Code of the State of California.

DATED this 31st day of August, 1973.

LAW OFFICES OF ROBERT R. ELLEDGE

By /s/ ROBERT R. ELLEDGE
ROBERT R. ELLEDGE 2/

Law Offices of
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FILED
1973 AUG 31 pm 3 03
STEVE R. NELSON,
CLERK

Attorneys for Defendant

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	NO. 122338
vs.	POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS
JOSEPH BELLIZZI, Defendant.	

1. Excessive and Unexcused Delay is Ground For Dismissal Of A Criminal Charge.

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial."

Sixth Amendment to United States Constitution.

* * *

"In criminal prosecutions, in any court / whatever, the party accused shall have the right to a speedy and public trial." 1/

Article I, Section 13, Clause 1 of the California Constitution.

* * *

"The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice."

Section 1050, Penal Code.

* * *

"Excessive, unexcused delay in a ground for dismissal of a criminal charge even though the particular delay is not specifically covered by a statute requiring mandatory dismissal. Article I, section 13, of the California Constitution states the fundamental policy that the defendant shall have the right to a speedy trial. The provisions of Article I, section 13, although lacking an express time limit, are self-executing and thus give the defendant a right to move for a dismissal for excessive delay even though the delay does not come within any of the mandatory dismissal statutes. (Cf. People v. Godlewski (1943) 22 Cal. 2d 677, 682 [140 P. 2d 381]; Witkin, Cal. Criminal Procedure (1963) # 306, p. 300. See also Pen. Code, # 1050.) 1/ 2/

"We do not question the right of the People to dismiss a felony charge and to refile it at any time before limitations have run. (Pen. Code, #1387; People v. Godlewski, supra, 22 Cal. 2d at p. 681.) The People, however, cannot avoid dismissal for unwarranted delay simply by successive dismissals and unexcused refilings of the same charges, unconscionably extending the pendency of the criminal charges without trial."

People v. Flores, 202 Cal. App. (2d) 315, at page 321.

* * *

2. There Is No Presumption That Good Cause For Delay In Trial Exists.

"' [W]hat is a speedy trial in the constitutional sense ...depends on the circumstances of each case bearing on... good cause' for the delay in bringing a defendant to trial. (In re Lopez (1952) 39 Cal. 2d 113, 120 [245 P. 2d 1]; see also Pollard v. United States (1957) 352 U.S. 354, 361 [77 S. Ct. 481, 1 L. Ed. 2d 393].) When there has been an extended delay in bringing a defendant to trial, 'it is not necessary that the party accused affirmatively show prejudice. ... It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause it was for the prosecution to show it.' (Harris v. Municipal Court, supra, 209 Cal. 55, 64; see also In re

Begerow, supra, 133 Cal. 349, 354.)"

Barker v. Municipal Court, 64 Cal. (2d) / 806, at page 812. 3/

* * *

3. Where There Is No Legitimate Reason For Delay And The Defendant Is Prejudiced Thereby, He Is Denied Due Process Of Law.

"The accused has substantial rights which must be protected, and the delay between the alleged offense and the time of arrest must not result in a deprivation of due process.* Delaying the arrest of the accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred. ... There is no doubt that under certain curcumstances the delay in filing the accusation makes it difficult or impossible for the accused to adequately prepare his defense. We agree with the statement in Powell v. United States, 352 F. 2d 705, 708 (122 App. D. C. 229),

that 'an accused must show two things in order to invoke an exercise of our supervisoty power because of alleged basic "unfairness" [citation omitted] resulting from claimed delay in his arrest: that there was (1) no legitimate reason for the delay, and that he was (2) prejudiced by the delay.'" (Emphasis Ours.)

People v. Wright, 2 Cal.App. (3d) 732, at pages 736-737.

* * *

"In order to establish a denial of due process based upon a delay short of the statutory period the defendant must show that there / was no legitimate 4/ reason for the delay and that he was prejudiced by it."

People v. Dontanville, 10 Cal. App. (3d) 783, at page 789.

* * *

"'We think that an accused must show two things in order to invoke an exercise of our

supervisory power because of alleged basic "unfairness", cf. Ross v. United States, infra, note 6, resulting from claimed delay in his arrest: That there was no legitimate reason for the delay, and that he was prejudiced by the delay. Powell v. United States, 352 F. 2d 705, 708 (D. C. Cir.)"

People v. Gilmore, 239 Cal. App. (2d) 125, at page 129.

* * *

"In some cases, the length of that delay [delay between date of alleged offense and date of arrest] may be so great that prejudice can be presumed unless the Government can show otherwise. But we cannot presume prejudice after a delay of five months. Some showing is necessary.

"That is not to say that prejudice must be proved beyond a reasonable doubt, or even by a preponderance of the evidence. In Ross, [349 F. 2d 210] we held it sufficient that the accused was able to establish only 'a plausible claim of inability to recall or reconstruct the events of the day of the offense'. Ross v. United States, supra,

note 1, 349 F. 2d at 215. / 5/

"Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim."

Jackson v. U. S., 351 F. 2d 821, at pages 822-823 (1965, D. C. Cir.)

* * *

"Such a basis for decision is wholly unsatisfactory and denies the defendant the essentials of a fair hearing, where through the Government's inaction, he was deprived of the opportunity to secure Jones as a witness. ... The twenty-month delay in notifying Curry of the pendency of these charges is responsible for his present inability to locate Jones, no plausible justification has been offered for the delay. ... [citing U. S. v. Parrot, 248 F. Supp. 196, 204] [T]he Government has not adequately justified the delay. As to the twenty-two months' delay wherein the matter was in the hands of the United States

Attorney, the only excuse that the Government has tendered is the pressure of the work in the U. S. Attorney's Office.'"

United States v. Curry, 284 F. Supp. 458, at page 467 (1968, N. D. Ill.)

* * *

"In addition to exerting every effort to require the State to try him there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue unnecessary. We therefore reverse and remand to the District/ 6/ Court of Appeal of Florida, First District, with directions to vacate the judgment appealed from and direct the dismissal of any proceedings arising out of the charges on which that judgment was based."

Dickey v. Florida, 298 U. S. 30, at page 32.

* * *

4. The Effect Of The Conduct Of The Prosecution Was To Deny The Defendant's Right To A Speedy Trial Because The Delay Was Unreasonable And Resulted In Prejudice To The Defendant.

> "'The right to a speedy trial is a "fundamental right granted to the accused and ... the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act." (Harris v. Municipal Court (1930) 209 Ca. 55, 60-61 [285 P. 699].) The function of this vital constitutional provision is "to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers." ...
>
> "The Legislature has enacted various specific provisions implementing the constitutional right to a speedy trial. For example, Penal Code sections 799-801 impose limitations on the time for commencing criminal actions; Penal Code section 825 imposes a time limit within which a defendant must be taken before a magistrate; Penal Code section 739 imposes a time limit within which an information must be filed; and Penal Code sections 1381-1387 establish standards

for the dismissal of an action for want of prosecution. Although none of the above legislative provisions deal with a pre-arrest delay, it does not follow that there is no remedy if such delay results in the denial of the right to a speedy trial. As stated in Barker v. Municipal Court, supra, 64 Cal. 2d 806, / 812, "While the courts 7/ have regularly adopted and enforced legislative interpretation of the constitutional provision for speedy trial, the constitutional provision "is self-executing". (Harris v. Municipal Court, supra, 209 Cal. 55, 60.) "[I]t is not necessary to have specific legislation to carry into effect section 13 of article I. ..." (Rost v. Municipal Court (1960) 184 Cal.App. 2d 507, 511 [7 Cal. Rptr. 869, 85 A.L.F. 2d 974].) The provisions of the Penal Code are merely "supplementary to and a construction of' the Constitution." (People v. Wilson, supra, 60 Cal. 2d 139, 145; People v. Godlewski, 22 Cal. 2d 677, 682 [140 P. 2d 381].) It is thus unnecessary for petitioner, in asserting his constitutional right to a speedy trial, to rely on specific statutory provisions applicable to pre-arrest delays.

...

"The argument has also been made that the guarantee of a speedy

trial should not be applied to pre-arrest delays because the allowable period between the offense and initiation of prosecution is controlled exclusively by the applicable statute of limitations. The statute of limitations, however cannot be invoked to curtail the self-executing constitutional guarantee of the right to a speedy trial. Although the statute of limitations is the primary legislative guarantee against bringing overly stale criminal charges, it is not the sole guarantee. It imposes an outside limit on the initiation of a prosecution regardless of how justified the delay may have been.

...

"Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and to secure evidence of his activities at the time of the events in question. ...

...

"...in the instant case prejudice and / unreasonable delay clearly 8/ appear, and we conclude that petitioner was denied his right to a speedy trial."

Jones v. Superior Court, 3 Cal.

(3d) 734, at pages 738-741.

* * *

See also, People v. Superior Court, 5 Cal. App. 3d 698, at pages 703-704; People v. Neustice, 24 Cal. App. 3d 178, at page 189; People v. Williamson, 26 Cal. App. 3d 740, at page 742.

* * *

Respectfully submitted,

LAW OFFICES OF ROBERT R. ELLEDGE

By Robert R. Elledge
Attorneys for Defendant 9/

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SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOSEPH BELLIZZI, Defendant.	NO. 122338 DEFENDANT'S FURTHER MEMORANDUM OF POINTS AND AUTHORITIES

In People v. Kiihoa, 53 Cal. (2d) 748, defendant was charged with sales of narcotics. It was alleged the transaction occurred on April 23, 1958. He was first arrested 84 days later on July 16, 1958, concerning the alleged violation but was released. The release was designed

to protect an informer's identity. Subsequently, he was rearrested on September 29, 1958, some 5 months and 6 days after the commission of the alleged offense. Upon conviction, defendant appealed alleging in substance that he had been denied a fair trial because a material witness was not produced upon the defendant's motion, the motion having been / denied. 1/ In reversing the conviction, the Supreme Court had this to say at page 752:

> "The narrow question is the present case is whether the concept of a fair trial has been denied where the prosecution is allowed to arrange to withhold prosecution of a suspect during such time as a material witness might be available, and proceed to trial only when that witness is believed to be out of the jurisdiction and not available to testify.
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> "The intentional suppression of material evidence by the state would, of course, be a denial of a fair trial and due process. This could, in some circumstances, be manifest by a failure of the prosecution to call certain witnesses. (Curtis v. Rives,

123 F.2d 936, 938 [75 App. D.C. 66]; cf. Mooney v. Holohan, 294 U.S. 103 [55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406].) Such a denial would likewise exist where the prosecution was allowed to control the course of proceedings in a manner which would prevent the accused from presenting material evidence."

Note the similarity in result with the case of Dickey v. Florida, 298 U.S. 30, at page 32, involving potential witnesses unavailable to the defendant.

In our case, it is alleged the offense was committed on January 31, 1973. Over 7 1/2 months have elapsed and defendant has not been tried. The Court has already determined (by its Certificate) that Evans is a material witness. He is not presently available. The delay was for the convenience of the government. It has prejudiced the defendant. Whatever the motive / of 2/ the People, as stated in Kiihoa, page 754:

"Such motives and purposes cannot prevail when, as here, they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial. It has been said that the basic issue lies in a balance of the public interest in protecting the flow of information against the individual's right to prepare his defense. (Roviaro v. United States, 353 U.S. 53, 62 [77 S.Ct. 623, 1 L.Ed.2d 639].) In the present circumstances that issue must be resolved in favor of the preservation of individual rights."

The comments of the Judge at the time of the preliminary hearing in this matter might also be appropriate. They appear at page 79 of the transcript of the preliminary examination as follows:

"I'd like to say, Mr. Elledge, if I assume this matter gets to the stage of being set for trial and that witness is not available at that time, notwithstanding additional evidence to produce him by either the People or you, I am sure that People ought to, at this moment, be concerned with trying to locate Mr. Evans, then perhaps you will get a different

ruling upon review."

Respectfully submitted,

LAW OFFICES OF ROBERT R. ELLEDGE

By ROBERT R. ELLEDGE
Attorneys for Defendant 3/

APPENDIX F

THE COURT: What's the conditional waiver?

MR. ELLEDGE: Without prejudice to our motion based on due-process ground and speedy-trial ground that this matter should be dismissed. Let me say I have no secrets.

THE COURT: Are you talking about rights that have accrued up to this date?

MR. ELLEDGE: Right. That is the understanding we had last time, Judge. Let me say this to you --

THE COURT: Is that acceptable to you, Mr. McAllister?

MR. STAHL (District Attorney): I don't want to intervene, but if Mr. Elledge wants a continuance he can't have his cake and eat it, too. If the Motion for Dismissal has been denied, we have a right to go to trial. It's as clear as that, and we want to go to trial. If he wants to move for a continuance that's

his move.

MR. ELLEDGE: I am trying to accommodate the Court's suggestion. Under those circumstances should I be deemed to be moving for one?

THE COURT: All right. My ruling, frankly, was conditional and I was indicating to you that I would grant the continuance so long as it was understood that the continuance doesn't increase your client's rights. Isn't that what we are talking about? You either are going to attempt to accrue additional rights by reason of a continuance or you're not from that date on. 66/

MR. ELLEDGE: The cases that deal with speedy-trial situations and with due-process problems among other things are directly related to the nature and extent of delay, so if you're saying now because we have had this delay once, plus all of the business we had on the first charge,

which was an Indictment, which was dismissed, that by putting it over to now to the 12th of November we are not suffering any more prejudice, I certainly can't concur in that.

THE COURT: Then I can't grant your continuance request and I will have to stand with the ruling denying your Motion.

MR. ELLEDGE: There's only one more thing. I want an opportunity to get a Writ of Prohibition.

AFFIDAVIT OF SERVICE

I, LOUISE M. ARMSTRONG, a stenographer in the office of ROBERT R. ELLEDGE, the attorney of record for JOSEPH BELLIZZI, Petitioner herein, depose and say that on the 22nd day of November, 1974, I served three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI, on the several parties thereto as follows:

On the Superior Court of Stanislaus County by mailing three copies in a duly addressed envelope, with postage prepaid, to Jeremy C. Cook, Judge, Superior Court, County of Stanislaus, Courthouse, Modesto, California 95354.

On the County of Stanislaus by mailing three copies in a duly addressed envelope, with postage prepaid, to Donald N. Stahl, District Attorney, County of Stanislaus, Courthouse, Modesto, California 95354.

On the People of the State of California by mailing three copies in a duly addressed envelope with postage prepaid, to Evelle J. Younger, Attorney General, 500 Wells Fargo Bank Building, 5th and Capitol Mall, Sacramento, California 95814.

All parties required to be served have been served.

Louise M. Armstrong

LOUISE M. ARMSTRONG

Subscribed to me before me at Modesto, California this 22nd day of November, 1974.

Notary Public

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